

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C. 20036

In the Matter of)
)
DISTRIBUTION OF CABLE)
TELEVISION ROYALTY FEES)

SUMMARY STATEMENT OF THE DIRECT CASE
OF THE CHARACTER CLAIMANTS

This constitutes the statement, in summary form, of the direct case of the character claimants, whose names appear at the foot hereof. It is submitted in accordance with the Tribunal's ruling, at the February 14, 1980 conference of all claimants, that such statements be filed on or before March 17, 1980. (later extended to March 24, 1980).

A. Affidavit Testimony: Identification
of the Character Claimants, Their
Copyrighted Works, and Secondary
Transmissions

Each character claimant is submitting herewith an affidavit containing the following information:

(1) identification of each character claimant as the owner (currently, and throughout 1978, the relevant period) of copyright in certain pictorial, graphic and sculptural works, namely, well-known, distinctive and popular artistic visual character creations ("characters")

(2) identification of the principal characters owned by each claimant, together with photographs or illustrations of those characters

(3) identification of the titles of the principal non-network television programs or series featuring the characters during 1978, including certain information concerning those programs to the extent included in the survey conducted by The Arbitron Company during the four-week period November 1 through November 28, 1978 and reproduced as audience estimates in "Arbitron Television Syndicated Program Analysis -- November 1978"

(4) with respect to these programs, identification of at least one distant, non-network secondary transmission made by a cable system during 1978 *

(5) testimony that the copyrighted characters were included without transformation in appearance or identity in the television programs in which they were featured, so that each character continued to retain its independent existence, its immediately recognizable identity and its distinctive appeal apart from and, indeed, paramount to the particular stories, settings or other programming material in which the character was included.**

The character claimants do not propose to introduce, at the evidentiary hearing, live testimony merely to repeat their sworn affidavit testimony. The foregoing matters are, we submit, essentially non-controversial and undisputed, and the character claimants will therefore rely on their affidavits with respect to the matters covered therein.

* See also the March 21, 1980 affidavit of Tami Kaiser and the schedules annexed thereto concerning such cable carriage and related matters.

** See also the March 14, 1980 affidavit of Albert Gottesman, which is described in Section B, on page 6.

B. Live Testimony: The Value or Worth,
in Qualitative Terms, of the Characters

The character claimants expect to produce at the evidentiary hearing an expert witness to testify as to the value, benefit, popularity and significance of the characters, including (i) the direct benefit of the characters to cable systems by, for example, enhancing their ability to attract subscribers and increase revenues, (ii) the popularity of the characters with cable subscribers and viewers, and (iii) such value and benefit being based on the characters themselves (not the other programming material).

One of our expert witnesses will be Vivian Horner, Ph.D. Dr. Horner's qualifications and credentials are impressive.

She is Vice President of Program Development for Warner Cable Corp. Her work in the development of high quality program concepts in education and entertainment for children has been recognized internationally. She has been appointed to the new Presidential Commission on Foreign Language and International Studies established by President Carter.

Dr. Horner, who joined Warner Cable in 1976 as a member of the original QUBE development group, had previously been Director of Research for the Children's Television Workshop. Her creative contributions have been a major factor in establishing Warner as the industry's leading pioneer in original educational and children's programming, such as Nickelodeon, the Young People's Satellite Network.

Dr. Horner is a recognized authority in language learning and children's education, having earned a Ph.D. in

Psycholinguistics from the University of Rochester after varied professional experiences in foreign language instruction and programmed learning. She received her B.A. and M.A. degrees from Ohio State University, and is a Fellow at the Center for Studies in Children's Television, Harvard University.

Dr. Horner will testify on the value and importance of "characters" in video programming. A brief synopsis of her testimony follows.

She will point out that, for almost anyone who has been involved in television programming for children, it is beyond question that the single most effective genre of programming for producing the largest possible audience is that of animated programming, including cartoon characters and their individual characteristics and traits.

Although the networks have been under extraordinary pressure over the last several years to reduce the number of cartoon programs shown in the Saturday morning slot, the so-called "Kid Vid Ghetto," nevertheless from 1973 to 1979 the decrease has been negligible, according to the recent report issued by the FCC's Task Force on Children's Programming. The reason is simple -- if any network tried to show some other form of programming in competition with cartoons, it would be "killed in the ratings"; that is, it could not produce an audience large enough to justify the necessary advertising revenues.

The experience of independent stations, and even network affiliates, who have chosen not to carry cartoons and to substitute their own locally originated programs,

will corroborate this. Nothing competes favorably with cartoons.

It is beyond question that the cartoon characters are of extraordinary financial benefit to the commercial broadcasters, and to the cable systems carrying broadcast material, and, in fact, such material forms the backbone of children's programming. Indeed, cable systems, in selling their service to subscribers, ordinarily emphasize the children's programming (the key component of which is the "characters") which they carry, thus further corroborating the significant benefit of such material to cable systems. A photocopy of an example of this type of promotion is attached hereto, and actual samples will be produced at the hearing.

It is clear, as well, that "plot" is a secondary consideration in animated cartoons; generally the plots are entirely predictable and viewers are really watching because they love the "characters," most often drawn from favorite comic books. The "characters" are, in fact, the primary attraction in these very popular cartoon series.

The situation is similar with respect to "live" impersonations of comic-book "Superheroes" characters in the very popular television series derived from such sources. Though plots tend to be somewhat more inventive, they are still largely of background and incidental interest and importance. Again, "characters" are the primary factor in drawing and holding an audience.

Further, in considering the Muppet characters, Dr. Horner will testify that, although not cartoon characters, the Muppet characters function in much the same way because of the attractiveness and distinctiveness of the characters -- they are lovely, wonderful and engaging. In fact, "The Muppet Show" introduces a new dimension. It is not "children's programming," but is adult entertainment created for family viewing and, while it undoubtedly is expected that children will watch too, its primary audience is adults.*

In other words, children, as well as adults, are drawn to and thus view the characters, not the other programming material, making the "characters" more important than the "story." This phenomenon is further apparent from the fact that the identical character programming is frequently repeated and rerun within very short time periods, often in the very same week, without reduction in viewer interest.

In sum, the importance and value of "characters" in video programming delivered by cable systems, especially for children, but also for adults, cannot be overstressed.

Dr. Horner will refer to the findings, set forth in the Federal Communications Commission October 1979 report titled "Television Programming for Children: A Report of the Children's Television Task Force," and, based on those studies, and on the Arbitron survey, will establish that 6.32% of all programming from syndicated sources in 1978 consisted of animated or cartoon character programming, that

*See also the March 14, 1980 affidavit of Albert Gottesman, Vice President of Henson Associates, Inc. and Muppets, Inc., demonstrating that it is the Muppet characters, not the other elements of the program (such as story line or theme), which create the enormous appeal of "The Muppet Show" and "Sesame Street." Indeed, "The Muppet Show" was "sold" for television solely on the basis of the visual portrayal of its puppet characters.

an additional .35% of all programming from syndicated sources in 1978 consisted of "The Muppet Show," and that "Sesame Street" and "The Electric Company" ordinarily occupy about 17.8% of the total air time of the Public Broadcasting System.

The character claimants expect that Dr. Horner's direct testimony will probably not exceed approximately two hours.

Joseph P. Grant, an additional expert witness who will appear for the character claimants, is the Chairman of the Board, President and Chief Executive Officer of Licensing Corporation of America ("LCA"). LCA is in the business of licensing the property rights of its clients, such as copyrighted and trademarked characters, logos, and insignia, to third parties who utilize such rights in the manufacture and marketing of their products and services. LCA is the world's largest licensing company of its type and represents a diverse range of properties. Among LCA's clients are several prominent sports entities and DC Comics Inc., Warner Bros. Inc. and Metro-Goldwyn-Mayer, Inc., each of which owns a large number of celebrated fictional cartoon characters.

Mr. Grant, who has been with LCA for over eleven years and its President for eight, will testify to the high degree of popularity and recognition attributable to cartoon characters that have had substantial television exposure relative to merchandise. There is a very direct correlation between frequent television exposure in one or more formats

and the sales of retail merchandise based upon or connected with the characters which are included in such formats. Furthermore, Mr. Grant will testify that the characters transcend the very cartoon programs that spawn their lives, and indeed become "larger than life." Based upon his experience, Mr. Grant will testify that it is the depiction of the character and its basic characteristics that is licensed and used in merchandising, and not any story line or plot or any of the other elements incorporated in any programming in which the characters are included. Popular merchandising items, for example, include dolls and even vitamins (three-dimensional replicas of the characters), as well as mugs, cups, glasses, clothing, toys and novelty items bearing two-dimensional depictions of the characters directly on the item.

In Mr. Grant's experience the cartoon and Muppet characters, which are the subject of this proceeding, have great merchandising worth generated by their television exposure, and conversely their repeated exposure in the marketplace to the public consciousness in turn increases the value of the television programs featuring such characters.

The character claimants expect that Mr. Grant's direct testimony will not exceed approximately one hour.

C. The Percentage of the Cable Royalty
Fees to which the Character
Claimants Are Entitled

The Tribunal has previously received and considered in extenso all arguments and information in support of, or in opposition to, the positions of the claimants concerning the validity of claims -- or legal standing or copyright ownership -- as such matters affect the right to any of the cable television royalties.

The only question remaining for the hearing, therefore, is "how much" the claimants are entitled to, not "whether" they are so entitled. The single task now facing the Tribunal is to determine the proportionate division of the compulsory royalty fund among those claimants not expressly excluded by the Tribunal's December 15, 1979 notice. 44 Fed.Reg. 75201 (Dec.19,1979). Evidence and argument directed to issues other than the amount of the claims and the proportionate division of the cable royalties among the claimants are not germane to the forthcoming hearing.

The basis of the character owners' claims to cable royalties is intrinsically different from the basis of the claims of the motion picture and syndicated program producers ("program syndicators"). The character owners' claims are not linked to, derivative from, or otherwise connected or related to the program syndicators' claims; the claims of these parties are entirely independent of one another and must be treated in separate categories. For these reasons, the claims of the character owners and the claims of the program syndicators do not conflict or detract from or diminish each other.

The character owners are asserting claims only with respect to their characters -- and not with respect to the programs (as a whole) in which those characters are featured, nor with respect to any other programming material, such as the stories, plots, themes, and settings.

The characters, like music -- and in sharp contrast to the works of the other claimants in this proceeding -- are components of programs but are not themselves programs. To be sure, characters and music -- though both are included in television programs -- nevertheless retain their separate identities and distinctive characteristics; neither characters nor music merge into the other program material, and neither class of works undergoes any transformation. The characters, however -- unlike music in the ordinary case -- are not subordinated to the other programming material; to the contrary, the characters form the central focus and appeal of the programs and television series in which the characters appear.

Because the characters (like music) are copyrighted works which are distinct components of programs, but are not themselves "programs," the characters cannot be valued on the same basis as the interests of the other major claimants, such as the program syndicators, the sports owners and the broadcasters, for whose programs it may be possible and appropriate to consider such factors as total cable carriage time or share of total cable audience.

The characters (no more than music, see "Pre-Hearing Memorandum of the American Society of Composers, Authors and Publishers" at 5-6) cannot, however, be valued on the

basis of either total cable carriage time or share of total cable audience (assuming that either of those bases could even be measured with an acceptable degree of precision for any claimant). See, e.g., the March 21, 1980 affidavit of Tami Kaiser.

Music contends that it "is included in virtually all programs" (see ASCAP pre-hearing memorandum at 5). Animated or cartoon characters and the Muppet characters, on the other hand, represented at least approximately 7% of all syndicated programming during 1978. The character claimants therefore urge, for the purpose of this particular proceeding covering the year 1978, that, at a minimum, the same percentage of the cable royalty fees ultimately allocated to music should be used in calculating the share due the character claimants, except that the character claimants' percentage share should apply only to no less than 7% of the total cable royalty fees.

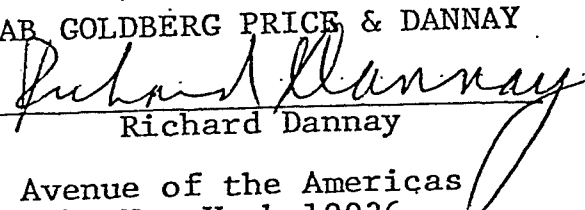
To illustrate: if the music claimants were awarded 15% of the cable royalty fund, then the character claimants (jointly) should receive at least .0105 (15% times .07) of the cable royalty fund; i.e., at least approximately 1% of the fund.

Dated: New York, N.Y.
March 21, 1980

Respectfully submitted,

SCHWAB GOLDBERG PRICE & DANNAY

By


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ATTORNEYS FOR CLAIMANTS:

Archie Comic Publications, Inc.
DC Comics, Inc.
Harvey Cartoons
Henson Associates, Inc.

King Features Syndicate, Inc.
Larry Harmon Pictures Corp.
Marvel Comics Group, a Division of
Cadence Industries Corporation
Muppets, Inc.
Radio Comics, Inc.

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